IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRANCE FOWLER,	)	
Petitioner,	)	Civil Action No. 14-151 Erie
	)	
v.	)	Senior District Judge Terrence F. McVerry
	)	Magistrate Judge Susan Paradise Baxter
JON FISHER, et al.,	)	
Respondents.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the petition for a writ of habeas corpus filed by state prisoner Terrance Fowler ("Petitioner") pursuant to 28 U.S.C. § 2254 be denied and that a certificate of appealability be denied.

II. REPORT

A. Relevant Background[1]

This case is about the July 7, 2010, robbery of the Aleks Cher Jewelry Store and the shooting of the store's owner, Aleksandr Cheremnykh. Petitioner was charged with crimes related to that robbery and shooting and his two-day trial commenced on July 14, 2011, in the Court of Common Pleas of Erie County. David G. Ridge, Esquire, was Petitioner's trial attorney.

Cheremnykh was the prosecution's first witness. He testified that on July 7, 2010, at around 11:30 a.m., two black males entered his jewelry store, which is located at 4520 Peach Street, Erie,

[1] In addition to filing electronically certain relevant state court documents at ECF No. 9, Respondents submitted a hardcopy of the documents that were filed in the Court of Common Pleas of Erie County in Petitioner's underlying criminal case, including the relevant transcripts. The documents filed in the Court of Common Pleas are indexed and numbered 1 through 36. Those documents are cited herein as "CP No. __ ."

Pennsylvania. Both males were wearing ski masks, baseball caps, and dark sunglasses. (7/14/11 Trial Tr. at 26-28). Cheremnykh could not see their faces and could not identify either of them. (Id. at 47). He testified that one of the robbers approached him and pointed a gun at him. Cheremnykh recalled that this individual was wearing a "dark blue almost black T Shirt[,]" and a baseball cap that was also a dark color. (Id. at 26-27). Accordingly to Cheremnykh, the second individual was wearing a plain white shirt. (Id. at 29). Cheremnykh testified that the first individual told him to open the safe, and that when Cheremnykh hesitated, that individual shot him in the chest. (Id. at 30-31).

Cheremnykh testified that the two individuals took several silver certificates and keys and then ran out of the store and fled the scene on foot. (Id. at 34-35). Cheremnykh, who did not realize how seriously he was injured, attempted to chase after them before he collapsed. (Id. at 31-32). The police and paramedics soon arrived and he was transported to a hospital in Pittsburgh. He remained in a coma for about seven days. (Id. at 33). At the end of Cheremnykh's direct testimony, the surveillance video that captured what occurred outside of his store was played for the jury. (Id. at 36. See also 7/15/11 Trial Tr. at 87).

The prosecution's next witness was Bruce Wagner. He lived less than a quarter of a mile from the jewelry store. (Id. at 52). Wagner testified that at approximately 10:50 a.m. on July 7, 2010, he was in his living room when he observed from the window a "small green four-door" car being parked on the street outside his home. (Id. at 54). He saw the two occupants of the car get out and walk south out of his sight. (Id.) Wagner stated that the driver of the car was dressed in dark colored clothing, and the passenger had on a white shirt. (Id. at 54-55). About ten minutes later, the two individuals came back to the car and drove away. (Id. at 55). Wagner testified that, at that point, the behavior of the individuals he observed did not concern him. (Id.)

Wagner next testified that no more than five minutes later, the same two individuals drove up again and parked outside his home in the same spot that they had parked previously. (Id.) This time, Wagner was in his kitchen and he was about 50 feet from the individuals he was observing. (Id.) Wagner became suspicious, and when the two individuals exited their car and left the area again on foot, he went outside and wrote down the license plate number of their car. (Id. at 59-61). Wagner testified that after about ten to fifteen minutes, the two individuals came running back to the car. (Id. at 58). Wagner turned on his police scanner and heard that the jewelry store located around the corner from his house had been robbed. (Id.) Wagner ran outside and flagged down Officer Salvador Velez, who was driving by his house at the time. He gave the officer the license plate number of the green car that had been parked outside his house and a description of the individuals he saw. (Id. at 59-61).

Officer Velez later testified that after he spoke with Wagner, he went to the area where Wagner told him the green car had been parked. In that location, Officer Velez found a silver certificate. (Id. at 96).

Wagner testified that Petitioner was the man he saw driving the green car that had twice parked outside his house the morning of July 7, 2010. (Id. at 58-59). When the prosecutor asked him how he was able to identify Petitioner, Wagner responded: "[b]ecause he looked right at me before he got out of the car the second time." (Id. at 59). Wagner also testified that he had never seen Petitioner before the incident in question and that he did not get a clear view of the face of the individual who was with Petitioner that morning. (Id.) He also explained that the first time he identified Petitioner was at the preliminary hearing. (Id. at 61-62).

On cross-examination, Wagner admitted that before he identified Petitioner at the preliminary hearing, he had seen reporting on the local news that Petitioner was one of the individuals arrested for the robbery. (Id. at 78-80). That reporting contained video of Petitioner in handcuffs. (Id. at 80-81).

Wagner also admitted that when he was asked at the preliminary hearing to identify the other individual he saw with Petitioner the day of the robbery, he failed to identify Damon Dixon, who was Petitioner's co-defendant.[2] (Id. at 84). On redirect examination, Wagner stated that he was "[a]bsolutely positive" that Petitioner was the individual he observed during the incident in question. (Id. at 86).

The police traced the license plate information Wagner had given to Officer Velez to Petitioner's residence and the police arrived there shortly before 1:00 p.m. on July 7, 2010.[3] (7/14/11 Trial Tr. at 103-04, 107-08). Officer Don Sornberger testified that a green car with a Pennsylvania license plate matching the number that Wagner had recorded was parked in the driveway of Petitioner's residence. (Id. at 104, 110-12). He took Petitioner and his father, James Fowler, into custody. (Id. at 106. See also id. at 115-16, 120-21).

After the police detained Petitioner, Detective Jim Spagel read him his Miranda rights and interviewed him. Petitioner told Detective Spagel that at around 9:30 a.m. that day, he drove his girlfriend to work and dropped his daughter offer at daycare. (Id. at 118). He also told Detective Spagel that he was the only person in control of the car from between 9:30 a.m. and the time the police arrived at his home that afternoon. (Id. at 119). Detective Spagel's interview with Petitioner was recorded and it was played for the jury.

The police searched Petitioner's home. Detective Adam DiGilarmo testified that during the search the police recovered, among other things, a Mossberg shotgun, which he found positioned between the mattress and box spring of a bed located in an upstairs bedroom. (7/15/11 Trial Tr. at 16). The gun had two live shells in it. (Id.) When the prosecution moved to have the gun admitted, defense counsel objected on the basis that there had been no allegation that the gun was used by anybody. (Id. at 17). In response, the prosecutor stated that during Petitioner's interview with Detective Spagel, Petitioner stated that there were no firearms in the house. Therefore, the prosecutor stated, the fact that a gun was found in the home showed that he lied to the police. (Id.) The court sustained the defense's objection on the basis that the gun's admission would be more prejudicial than probative. (Id. at 31).

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[2] After the defense closed its case, the trial court informed the jurors that Dixon's case was dismissed for lack of evidence and that fact was part of the evidence for it to consider. (7/15/11 Trial Tr. at 68).

[3] Officer Sornberger testified that he arrived at the Aleks Cher Jewelry Store at 12:23 p.m., and that he went to Petitioner's home approximately 20 to 30 minutes later. (7/14/11 Trial Tr. at 103-04, 107-08).

Detective DiGilarmo also participated in the search of Petitioner's car. Inside it he found, among other things, a black baseball cap and a white T-shirt. (Id. at 21-22).

James Fowler, Petitioner's father, testified for the defense. He lived with Petitioner and testified that the morning of July 7, 2010, Petitioner told him that that day he was going to be working on his car, which needed new brakes. (Id. at 37). James Fowler also stated that Petitioner left the home sometime before 9:00 a.m. to drive his girlfriend to work and his daughter to daycare. (Id. at 38-39). James Fowler testified that Petitioner "wasn't gone too long" and that he came home after "not quite an hour." (Id. at 40). After that, they began to work with the brakes on Petitioner's car. (Id. at 41). James Fowler also said that Petitioner did not leave the house again that day until the police came to the home that afternoon. (Id. at 42). Defense counsel asked James Fowler: "To the best of your recollection, then, how long had [Petitioner] been home before the police got there?" (Id.) James Fowler answered: "It wasn't quite an hour, maybe 45, 50 minutes. About – almost an hour." (Id.)

On cross-examination, James Fowler testified that he thought that Petitioner returned home the morning of July 7, 2010, "before 9:30[.]" (Id. at 49). He qualified his answer, however, by noting "[l]ike I say, who looks at the clock." (Id. at 50). The following exchange then occurred:

> Q. Well, I just want to ask, because we played [Petitioner's statement to Detective Spagel] in court yesterday and he told the police he was at the YMCA at 9:45, 10ish to drop his child off for day-care, so obviously, his time to the police and the time you're telling us aren't matching up, so are you sure?

> A. I'm not – I told you last time I wasn't sure. I wasn't sure. I didn't look at the clock or anything.

(Id.)

The defense next called Katie Peterson, and employee at the Glenwood Park YMCA. She testified that she was working on July 7, 2010, and that Petitioner dropped his daughter off at their daycare between 9:30 to 9:45 a.m. (Id. at 58). On cross-examination, Peterson stated that Petitioner was driving a green car that day. (Id. at 61).

At the conclusion of Petitioner's trial, the jury found him guilty of attempted homicide, aggravated assault, conspiracy to commit robbery, and possessing instruments of crime. On September 20, 2011, the court sentenced him to an aggregate term of 27 ½ to 55 years of imprisonment. The Superior Court of Pennsylvania affirmed his judgment of sentence on June 1, 2012. (ECF No. 9-3, Commonwealth v. Fowler, No. 1787 WDA 2011, slip op. at 8-11 (Pa.Super.Ct. June 1, 2012) ("Fowler I")).

In June 2013, Petitioner filed a *pro se* motion for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 PA.CONS.STAT. § 9541 *et seq*. (CP No. 24). The PCRA court appointed him counsel, who filed a supplemental PCRA motion. (CP No. 26). On July 17, 2013, the court issued a final order in which it held that no hearing was required and that Petitioner was not entitled to PCRA relief. (CP Nos. 29, 31).

Petitioner filed an appeal with the Superior Court and chose to proceed *pro se*. He raised four claims that his trial counsel provided him with ineffective assistance in violation of his rights under the Sixth Amendment. Petitioner is raising those same four claims in this case.

On March 3, 2014, the Superior Court issued an opinion in which it affirmed the PCRA court's decision to deny Petitioner relief. (Commonwealth v. Fowler, No. 1330 WDA 2013, slip op.

(Pa.Super.Ct. Mar. 3, 2014) ("Fowler II")).[4] The Superior Court denied on the merits the four claims at issue in this habeas case.

Before this Court is Petitioner's *pro se* petition for a writ of habeas corpus. [ECF No. 1]. He claims that his trial counsel provided him with ineffective assistance when he:

– failed to request an alibi instruction after "James Fowler testified that Petitioner was home when the crime occurred." [ECF No. 1 at 5] (Claim One).

– failed to file a motion to suppress Bruce Wagner's in-court identification, which was tainted by impermissibly suggestive procedures. [ECF No. 1 at 7] (Claim Two).

– failed to request a curative instruction after Detective DiGilarmo testified about recovering the Mossberg shotgun from Petitioner's home but the trial court sustained the defense's objection to the admission of the weapon. [ECF No. 1 at 8] (Claim Three).

– failed to request a "Kloiber instruction where the evidence supported an instruction." [ECF No. 1 at 10] (Claim Four).

Respondents filed an answer [ECF No. 9], to which Petitioner filed a reply [ECF No. 12].

B. Discussion

1. Standard of Review

This case is governed by the federal habeas statute applicable to state prisoners, 28 U.S.C. § 2254. Under this statute, "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Importantly, errors of state law are not cognizable. Id. See, e.g., Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Petitioner carries the burden of

[4] The copy of Fowler II that Respondents filed with this Court is missing pages. A complete copy of it was obtained from the Superior Court's website at <http://www.pacourts.us/courts/superior-court/court-opinions/> and is attached to this report and recommendation. Respondents are reminded that "[c]are should be taken so that all items [contained in the state court record] are photocopied accurately, legibly, and in full." LCvR 2254.E.1.c.

proving he is entitled to the writ. See, e.g., Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 1398 (2011).

In describing the role of federal habeas proceedings, the Supreme Court observed:

> [I]t must be remembered that direct appeal is the primary avenue for review of a conviction or sentence.... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983). Habeas corpus is a "'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which, among other things, amended 28 U.S.C. § 2254. AEDPA imposes "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Pinholster, 131 S.Ct. at 1398 (internal quotation marks and citations omitted).

Because the Superior Court denied on the merits the four claims at issue in this case, this Court's review of those claims is very limited. It is not for this Court to decide whether the Superior Court's decision was right or wrong. Rather, under AEDPA's standard of review, which is codified at § 2254(d), it is Petitioner's burden to show that the Superior Court's adjudication "resulted in a decision that was **contrary to, or involved an unreasonable application of**, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. §2254(d)(1) (emphasis added).[5]

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[5] Section 2254(d)(2) provides the standard of review for issues of fact, and it permits habeas relief only if the petitioner demonstrated that the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). BRIAN R. MEANS, FEDERAL HABEAS MANUAL §§ 3:73-74, § 3:79, WestlawNext (database updated June 2015). None of the claims before this Court involve solely an issue of fact. Therefore, § 2254(d)(2)'s standard of review does not apply to this case. If *Continued on next page…*

The "clearly established Federal law," 28 U.S.C. § 2254(d)(1), in which to analyze each of Petitioner's claims is governed by Strickland v. Washington, 466 U.S. 668 (1984). Strickland recognized that the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence" entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. 466 U.S. at 685-87. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" Burt v. Titlow, — U.S. —, 134 S.Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 690, 687).

To prevail on a claim of ineffective assistance under Strickland, Petitioner has the burden of establishing that his trial counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. Importantly, the Supreme Court emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" Titlow, 134 S.Ct. at 17 (quoting Strickland, 466 U.S. at 690); Harrington, 562 U.S. at 104 ("A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.") (quoting Strickland, 466 U.S. at 689).

The Supreme Court also instructed:

> "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, —, 130 S. Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with

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§ 2254(d)(2) did apply, Petitioner could not overcome it. The Superior Court's adjudication of each of his claims did not result "in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

> scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.

Harrington, 562 U.S. at 105.

Strickland also requires that Petitioner demonstrate that he was prejudiced by his trial counsel's alleged deficient performance.[6] This places the burden on him to establish "that there is a reasonable probability that, but for counsel's unprofessional errors," the result of his trial "would have been different." Strickland, 466 U.S. at 694. As the United States Court of Appeals for the Third Circuit explained:

> [The petitioner] "need not show that counsel's deficient performance 'more likely than not altered the outcome of the case' – rather, he must show only 'a probability sufficient to undermine confidence in the outcome.'" Jacobs v. Horn, 395 F.3d 92, 105 (3d Cir. 2005) (quoting Strickland, 466 U.S. at 693-94). On the other hand, it is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 131 S.Ct. at 787 (citing Strickland, 466 U.S. at 693). Counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 787-88 (citing Strickland, 466 U.S. at 687). The likelihood of a different result must be substantial, not just conceivable. Id.

Brown v. Wenerowicz, 663 F.3d 619, 630 (3d Cir. 2011).

For the reasons set forth below, Petitioner has not met his burden of demonstrating that the Superior Court's adjudication of any of his claims "resulted in a decision that was **contrary to, or involved an unreasonable application of**" Strickland. Therefore, each claim must be denied.

[6] The Supreme Court in Strickland noted that although it had discussed the performance component of an effectiveness claim prior to the prejudice component, there is no reason for an analysis of an ineffectiveness claim to proceed in that order. 466 U.S. at 697. Consequently, if it is more efficient to dispose of an ineffectiveness claim on the ground of that the petitioner failed to meet his burden of showing prejudice, this course should be followed. Id.

2. The Superior Court's Adjudication Was Not "Contrary To" Strickland

"The test for § 2254(d)(1)'s 'contrary to' clause is whether the state court decision 'applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme] Court but reaches a different result.'" Rountree v. Balicki, 640 F.3d 530, 537 (3d Cir. 2011) (quoting Brown v. Payton, 544 U.S. 133, 141 (2005), which cited Williams v. Taylor, 529 U.S. 362, 405 (2000) and Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002)). The Superior Court applied the Strickland standard when it evaluated Petitioner's claims. (Fowler II, No. 1330 WDA 2013, slip op. at 6).[7] Accordingly, its adjudication of each of Petitioner's claims withstands review under the "contrary to" clause of § 2254(d)(1). Williams, 529 U.S. at 406 ("a run-of-the mill state-court decision applying the correct legal rule from [Supreme Court] cases [does] not fit comfortably within § 2254(d)(1)'s 'contrary to' clause.")

3. The Superior Court's Adjudication Was Not "An Unreasonable Application of" Strickland

The only remaining inquiry for this Court is whether Petitioner has established that the Superior Court's adjudication of any of his claims was an "unreasonable application of" Strickland. The Supreme Court explained that this burden is very difficult to meet, noting that "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." Harrington, 562 U.S. at 102.

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7 Pennsylvania law for judging ineffectiveness corresponds with the Strickland standard. Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa. 1987); Commonwealth v. Kimball, 724 A.2d 326 (Pa. 1999). Although Pennsylvania courts typically articulate a three-prong test for gauging ineffective assistance claims and Strickland sets forth its test in two prongs, the legal evaluation is the same, and the differences merely reflect a stylistic choice on the part of state courts.

Importantly, the Supreme Court instructed that § 2254(d)(1)'s "unreasonable application" clause:

> preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther…. **As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.**

Id. at 102-03 (emphasis added). The Supreme Court also instructed:

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," [Strickland, 466 U.S.] at 689; Lindh v. Murphy, 521 U.S. 320, 333, n.7 (1997), and when the two apply in tandem, review is "doubly" so, [Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)]. The Strickland standard is a general one, so the range of reasonable applications is substantial. [Id.] Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). **When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.**

Id. at 105 (parallel citations omitted) (emphasis added).

a. Claim One

In his first claim, Petitioner contends that his trial counsel was ineffective for failing to request an alibi instruction after "James Fowler testified that Petitioner was home when the crime[s] occurred. [ECF No. 1 at 5]. In denying this claim, the Superior Court first explained:

> "An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was **impossible** for him to be the perpetrator." Commonwealth v. Sileo, 32 A.3d 753, 767 (Pa.Super. 2011) (*en banc*) (citing Commonwealth v. Collins, 549 Pa. 593, 702 A.2d 540 (1997)) (emphasis added). "Where such evidence has been introduced, a defendant is entitled to an alibi instruction to alleviate the danger that the jurors might impermissibly view a failure to prove the defense as a sign of the defendant's guilt." Commonwealth v. Mikell, 556 Pa. 509, 517, 729 A.2d 566, 570 (1999).

(Fowler II, No. 1330 WDA 2013, slip op. at 7-8). The Superior Court next summarized James Fowler's testimony, in which he acknowledged that he was not sure what time Petitioner came home the morning of July 7, 2010, but that he thought that by the time the police arrived at their home, Petitioner had been there for about 45 to 50 minutes. (Id. at 8). The Superior Court concluded that since the police arrived around 1:00 p.m., the robbery at the jewelry store occurred at approximately 11:20 a.m., and Petitioner's home was "roughly 10 minutes from the jewelry store[,]" "James Fowler's testimony did not make it impossible for [Petitioner] to have been the perpetrator of the robbery." (Id. at 9). "Indeed," the Superior Court held, "his testimony regarding how long Fowler had been home prior to the arrival of the police placed [Petitioner] **out of the home** at the time of the robbery." (Id. at 10) (emphasis added).

Petitioner is not entitled to relief on this claim. As the Superior Court explained, James Fowler could not recall what time Petitioner arrived back home the morning of the July 7, 2010, and the time estimations that he did give did not make it impossible for Petitioner to have committed the robbery. Therefore, Petitioner has not established either of the required elements under Strickland, let alone that the Superior Court's adjudication of Claim One "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. Therefore, Petitioner has failed to demonstrate that the Superior Court's adjudication of Claim One was an "unreasonable application of" Strickland.

b. Claim Two

In Claim Two, Petitioner contends that his trial counsel was ineffective for failing to file a motion to suppress Wagner's in-court identification of him on the grounds that it was the result of impermissibly suggestive procedures. Because no evidentiary hearing was held on Petitioner's PCRA claims, Petitioner's trial attorney never testified in order to explain why he did not move to suppress

Wagner's identification, which Wagner admittedly gave after he saw Petitioner on the television news in handcuffs.

In resolving this claim, the Superior Court concluded that Petitioner failed to establish that he was prejudiced by his counsel's failure to file a motion to suppress Wagner's identification. (Fowler II, No. 1330 WDA 2013, slip op. at 12-13). The court explained:

> [E]ven assuming that Wagner did not have an independent basis for his identification of [Petitioner], we cannot conclude that [Petitioner] was prejudiced by his counsel's failure to file a motion to suppress the identification. In addition to Wagner's identification of [Petitioner] at the preliminary hearing and at trial, Wagner also testified to the license plate number and a description of the vehicle that the perpetrators of the robbery were driving. [7/14/11 Trial Tr. at] 54, 61. This was the same vehicle police found when they came to [Petitioner's] home. Id. at 112. [Petitioner] admitted to police that he was the only person in control of that vehicle on the day of the robbery between 9:30 a.m. and the time the police arrived to speak with him. Id. at 119.
>
> As there was evidence independent of Wagner's identification of [Petitioner] implicating [Petitioner] as the perpetrator of the robbery, there is no basis for concluding that there is a reasonable probability that the outcome would have been different if counsel had filed a motion to suppress the identification.

(Id. at 12).

Petitioner argues that the Superior Court's decision was an "unreasonable application of" Strickland because the mere fact that his car was near the scene of the crime was insufficient to establish his guilt. But, as the Superior Court explained, other evidence independent of Wagner's identification established more than just that Petitioner's car was parked near the scene of the crime. It establish that Petitioner was one of the two men that Wagner observed acting suspiciously outside of his home that morning. Specifically, the license plate information that Wagner recorded proved that the car Petitioner was using that morning was the car used by the two men he observed; Petitioner admitted to the police that he was the only one in control of that car during the time period in question; and, Petitioner was not at his own home during the time period in which the robbery occurred. Further, after Wagner flagged down Officer Velez to report what he saw, Officer Velez found a silver certificate in the vicinity where Petitioner's car had been parked. Considering all of this evidence, the Court cannot say that the Superior Court's adjudication of Claim Two "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. Therefore, Petitioner has failed to demonstrate that the Superior Court's adjudication of Claim Two was an "unreasonable application of" Strickland.

c. Claim Three

In his next claim, Petitioner contends that his trial counsel was ineffective for failing to request a curative instruction after the prosecution presented evidence that the police found the Mossberg shotgun in an upstairs bedroom of his house. In denying this claim, the Superior Court held:

> [Petitioner] argues that because the trial court excluded the shotgun from evidence based upon its conclusion that the evidence was more prejudicial than probative, trial counsel should have requested a curative instruction regarding the officer's testimony about locating the shotgun in [Petitioner's] bedroom….
>
> Once again, … the record does not support a finding that [Petitioner] was prejudiced by the presentation of testimony regarding the shotgun. As discussed supra, the evidence at trial included testimony that [Petitioner] was in the vicinity of the scene of the crime at the time the crime occurred and that proceeds of the robbery were discovered where is had car been parked. See supra, pp. 8-9.
>
> Furthermore, the record reflects that the testimony concerning the shotgun was brief:
>
>> A. We searched the entire bedroom. I found a Mossberg shotgun in between the mattress and box spring of the bed. I found empty a[] pancake holster underneath the bed along with a silver magazine underneath.
>>
>> Q. Showing you what's marked as Commonwealth Exhibit Number 13. Can you look at that and tell me if you recognize what's in this big box?
>>
>> A. Yeah, the Mossberg 12 shotgun.
>>
>> Q. What did you do with this gun after you recovered it?

> A. Unloaded it. There was [sic] two live shells in it, and then packaged them up.
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> N.T., 7/15/11, at 16.
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> Pursuant to our scope and standard of review, we cannot conclude, based on the evidence presented connecting [Petitioner] to the robbery, that the fleeting reference to the shotgun results in a reasonable probability that the outcome of the trial would have been different if counsel had requested a curative instruction regarding the above testimony.

(Fowler II, No. 1330 WDA 2013, slip op. at 14-15 (bracketed text in original)).

Petitioner contends that the Superior Court's conclusion was wrong and argues that the testimony regarding the shotgun was so incendiary that there is a reasonable probability that it affected the outcome of his trial. As explained above, it is not for this Court to decide whether the Superior Court's decision was right or wrong. See, e.g., White v. Woodall, 134 S.Ct. 1697, 1702 (2014) ("even 'clear error' will not suffice.") (quoting Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)). The only question for this Court is whether the Superior Court's determination that Petitioner failed to demonstrate that he was prejudiced by the absence of a curative instruction was an "unreasonable" application of Strickland. Because it cannot be said that that the Superior Court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement[,]" Harrington, 562 U.S. at 103, this Court must answer that question in the negative and conclude that Petitioner has failed to establish that the Superior Court's adjudication of Claim Three was an "unreasonable application of" Strickland.

d. Claim Four

In his final claim, Petitioner contends that he received ineffective assistance because his counsel failed to request that the trial court give a cautionary jury instruction regarding Warner's identification of him pursuant to Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954). In Kloiber, the Supreme Court of Pennsylvania held:

> where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions . . . the court should warn the jury that the testimony as to identity must be received with caution.

106 A.2d at 826-27 (citations omitted).

In denying this claim, the Superior Court held:

> [Petitioner] states that trial counsel was ineffective for failing to request a Kloiber instruction…. [Petitioner] bases his argument on the combination of Wagner's qualification, before misidentifying [Petitioner's] accomplice, that it had been three months since he observed the accomplice and Wagner's testimony that he was as certain of his identification of [Petitioner] as he was of [Petitioner's] accomplice. [Petitioner's] Brief at 27-29. According to [Petitioner], Wagner therefore equivocated on the identification of [Petitioner], and counsel thus should have requested a Kloiber instruction. [Petitioner's] Brief at 29-30.
>
> The PCRA court found this issue to be devoid of merit. It found that "the witness had a clear, unobstructed view of [Petitioner], observed [Petitioner] on more than one occasion, was sure [Petitioner] was the person he saw, and accurately identified [Petitioner] in the past." PCRA Court Opinion, 6/21/13, at 2.
>
> Our review of the record comports with that of the [PCRA] court. We find no support in the record for [Petitioner's] claim that Wagner ever equivocated regarding his identification of [Petitioner]. To the contrary, it is uncontested that Wagner identified [Petitioner] at the preliminary hearing (N.T., 7/14/11, at 83); testified at trial that [Petitioner] "looked right at [Wagner] before he got out of the car the second time" (id. at 59); and that he was "[a]bsolutely positive" that [Petitioner] was the person he saw driving the car on the day in question (id. at 86).

(Fowler II, No. 1330 WDA 2013, slip op. 16-17 (footnote omitted)).

The Superior Court's decision that Petitioner was not entitled to a Kloiber instruction is a state law determination that is not subject to review by this Court. See, e.g., Priester v. Vaughn, 382 F.3d 394, 401 (3d Cir. 2004) (federal habeas court cannot "reexamine state court determinations on state-law questions."). For that reason alone, Claim Four must be denied. It also must be denied because Petitioner has not established that the Superior Court's adjudication of Claim Four "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. Therefore, this Court cannot conclude that the Superior Court's decision to deny Claim Four was an "unreasonable application of" Strickland.

C. Certificate of Appealability

28 U.S.C. § 2253 governs the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition and it provides that "[a] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Applying that standard here, jurists of reason would not find it debatable whether each of Petitioner's claims should be denied. Accordingly, a certificate of appealability should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of habeas corpus be denied and that a certificate of appealability be denied.

Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: November 2, 2015

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

cc: The Honorable Terrence F. McVerry
Senior United States District Judge

Notice to counsel of record by ECF and by U.S. Mail to Petitioner at his address of record